

*In the Matter of Victor Murphy*  
DOP Docket No. 2003-2920  
**(Merit System Board, decided November 4, 2004)**

The appeal of Victor Murphy, a Juvenile Detention Officer with the County of Gloucester of his 180 working day suspension on charges, was heard by Administrative Law Judge Israel D. Dubin (ALJ), who rendered his initial decision on September 13, 2004. Exceptions were filed on behalf of the appellant, and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on November 4, 2004, accepted and adopted the Findings of Fact and Conclusions of Law as contained in the attached ALJ's initial decision, as well as the recommendation to modify the 180 working day suspension to a three-month suspension.

## **DISCUSSION**

The appellant was charged with insubordination and conduct unbecoming a public employee and suspended from February 25, 2003 to November 1, 2003. Specifically, the appointing authority asserted that the appellant repeatedly posted flyers at various locations in the Gloucester County Juvenile Detention Center, which indicated that two shirts had been stolen and accusing other staff members of the theft. After initially posting such a flyer on September 12, 2002, the appellant was advised that it was inappropriate by an employee in the Superintendent's office. However, he posted another similar flyer on September 16, 2002, which included the statement "You think [be]cause management did nothing and says I can't post my papers all over[,] it's done." This resulted in the issuance of "Special Instructions" from Superintendent Ted Perian prohibiting the posting of any correspondence on the premises without management approval. On September 18, 2002, the appellant posted his flyer on the union bulletin board. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ concluded that, based on the credibility of the witnesses, there was sufficient evidence to uphold the charges. Specifically, the ALJ noted that the language of the September 16, 2002 posting itself acknowledges that the appellant intentionally disregarded orders from superiors to refrain from hanging flyers of this nature on the premises. Moreover, while the appellant contended that he had received permission to hang his sign on the union bulletin board, the ALJ found the testimony of Bill Atkinson, the appellant's union representative, more credible. In this regard, Atkinson testified that he advised the appellant to send the flyer to the union office for approval. With regard to the penalty, the ALJ found that the appropriate penalty for the appellant's conduct was a three-month suspension. In this regard, the ALJ found that a significant penalty was warranted, since the appellant was employed as a Juvenile Detention Officer and should be held to a higher standard. Additionally, the

ALJ noted that the appellant has been disciplined on eight occasions since he commenced employment in 1991, including four prior disciplinary actions for conduct unbecoming a public employee and one prior discipline for insubordination.

In his exceptions to the ALJ's initial decision, the appellant initially argues that the ALJ improperly concluded that he was guilty of insubordination. The appellant contends that this conclusion did not take into account his testimony that he believed that the union bulletin board was outside the scope of Perian's "Special Instructions." With regard to the penalty, the appellant asserts that the ALJ erroneously subjected him to the higher standard of conduct reserved for law enforcement officers. The appellant argues the Juvenile Detention Officers are *not* law enforcement officers and, thus, should not be held to the higher standard of conduct outlined in *Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). In this regard, the appellant notes that *Moorestown*, *supra*, applies exclusively to municipal Police Officers, and it was extended to Correction Officers in *Moore v. Youth Correctional Institute*, 230 N.J. Super. 374 (App. Div. 1989), *aff'd*, 119 N.J. 256 (1990). Finally, the appellant asserts that the initial penalty imposed by the appointing authority, a 180 working day suspension, was contrary to the provisions of N.J.S.A. 11A:2-20 and N.J.A.C. 4A:2-2.4(a), which provide that no suspension or fine shall exceed six months, except for suspensions pending the outcome of a criminal complaint or indictment.

In response, the appointing authority emphasizes that the ALJ did not hold the appellant to the same standard as municipal Police Officers. Rather, he simply stated that the appellant, as a Juvenile Detention Officer, should be held to a higher standard than other public employees due to the nature of the position held. Specifically, the ALJ noted that the appellant was employed in a paramilitary organization and was responsible for the safety of individuals in his custody, his fellow Juvenile Detention Officers, and the public at large. In addition, the appointing authority contends that the appellant's reliance on his belief that the union bulletin board was exempt from the Superintendent's instructions is without merit. In this regard, the appointing authority maintains that the ALJ properly concluded that the appellant repeatedly defied orders to refrain from posting his flyers.

Initially, the ALJ's Findings of Fact were based on his assessment of the credibility of the witnesses. In this regard, the Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999) ). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto*, *supra*). The Board appropriately gives due deference to such determinations. However, the Board, in its *de novo* review, may reverse a credibility determination of an ALJ if it is not supported by the credible evidence in the record or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public*

*Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). In this case, upon thorough review, the Board finds that there is nothing in the record evidencing that the ALJ's findings in this regard were flawed or were not based on the credible evidence in the record. The ALJ found that the appellant's belief that he was permitted to post his flyers on the union bulletin board lacked credibility, given the credible testimony of Atkinson, who instructed him to forward the proposed posting to the union office for review and approval prior to posting. Moreover, as the ALJ noted in his initial decision, the very language of the appellant's September 16, 2002 posting acknowledged that he was instructed by superiors to refrain from posting any further flyers.

In determining the proper penalty, the Board's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Board utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway*, 81 N.J. 571, 580 (1980). In the instant matter, the appellant's disciplinary history reflects eight prior disciplinary infractions, including a seven-day suspension, since he commenced employment in 1991. In addition, it must be recognized that the appellant's repeated disregard of the prohibition on posting personal notices at his place of employment warrants a significant penalty. Such conduct signals an inability to control one's behavior and is contrary to the high standard of good conduct for a Juvenile Detention Officer. The appellant contends that he should not be held to the higher standard outlined in *Moorestown*, *supra*, because he is not a municipal Police Officer. While the Board agrees that the appellant's position is not analogous to that of a municipal Police Officer, it nevertheless finds that he was appropriately subjected to a heightened standard of conduct based on the nature of his position. Specifically, there is no dispute that the appellant is employed in a paramilitary setting and is charged with maintaining discipline and order in a juvenile custodial facility. Moreover, given the vulnerability of the population for which he is responsible, the appellant is also expected to project an image of maturity and integrity and provide the juveniles in custody with a positive role model. Thus, the Board finds it appropriate to hold the appellant, as a Juvenile Detention Officer, to a higher standard of conduct, given the nature of the position held. The appellant's conduct in the instant matter is clearly at odds with the above expectations. Accordingly, based on the totality of the record, including the seriousness of the offense and the appellant's prior record, the Board concludes that a three-month suspension is the appropriate penalty.

Finally, while the Board notes that the issue regarding the propriety of the 180 working day suspension imposed by the appointing authority has been rendered moot, the appointing authority is cautioned that, in future cases, suspensions and fines shall not exceed six months, except in cases involving suspensions pending the outcome of a criminal complaint or indictment. *See N.J.S.A. 11A:2-20 and N.J.A.C. 4A:2-2.4(a)*. *See also, Belleville v. Coppla*, 187 N.J. Super. 147 (App. Div. 1982); *Steinel v. City of Jersey City*, 193 N.J. Super. 629 (App. Div. 1984), *aff'd*, 99 N.J. 1 (1985).

Since the 180 working day suspension imposed by the appointing authority has been modified to a three-month suspension, the appellant is entitled to mitigated back pay, benefits and seniority from May 25, 2003 to November 1, 2003 pursuant to *N.J.A.C.* 4A:2-2.10.

*N.J.A.C.* 4A:2-2.12(a) provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div., March 18, 2004); *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Board, the charges were sustained. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay are finally resolved.

## **ORDER**

The Merit System Board finds that the appointing authority's action in imposing a 180 working day suspension was not justified. Therefore, the Board modifies the 180 working day suspension to a three-month suspension. The Board further orders that the appellant be granted back pay, benefits and seniority for the period of May 25, 2003 to November 1, 2003. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The parties must inform the Board, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.